UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. ROEDER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 08-0487 (EGS)
	)	Judge: Emmet G. Sullivan
THE ISLAMIC REPUBLIC OF IRAN,	)	
	)	
Defendant.	)	
	)	
	)	

UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Two matters are not at issue in this litigation: the suffering plaintiffs endured at the hands of their captors during the 1979 Iranian hostage taking, and the gratitude of the United States for the sacrifices they made and the courage they have shown on behalf of their country. The issue here, rather, is whether Congress has made clear an intention to abrogate the Algiers Accords – the agreement which, among other things, secured plaintiffs' freedom but barred the prosecution of claims against Iran for the hostage taking. Congress could easily have abrogated the Accords either by unambiguously creating a cause of action against Iran for the hostage taking or by expressly repealing the Accords. It has done neither, and the United States must therefore continue to uphold its international commitments.

Plaintiffs' assertion that section 1083[1] creates a cause of action confuses or conflates the

[1] As explained in the opening brief of the United States, section 1083 is contained in the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. 110-191, 122 Stat. 3, § 1083 ("Section 1083" or "§ 1083"). Section 1605A, to be codified as 28 U.S.C. § 1605A, is an amendment to 28 U.S.C. § 1605 and is set forth in section 1083(a).

separate statutory provisions which authorize jurisdiction and create a cause of action. Although the statute refers to Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 169 (D.D.C. 2002), aff'd, Roeder v. Islamic Republic of Iran, 333 F.3d 228 (D.C. Cir. 2003) (both referred to herein as "Roeder I"), it does so only to bestow subject matter jurisdiction. As this Court and the D.C. Circuit both held in Roeder I, merely authorizing jurisdiction does not create a conflict with the Accords and is not evidence of a congressional intent to abrogate them. Insofar as plaintiffs rely on section 1083 for a cause of action, it requires that a new case be related to a pending action, and there is no pending action here.

Plaintiffs also incorrectly assume that section 1083 must have been enacted with their case in mind. But the broad language, as well as the contemporaneous legislative history and the existence of claimants against other state sponsors of terrorism, refute that assumption. Section 1083 does not by its terms create a cause of action for these plaintiffs against Iran, and the general references to state sponsors of terrorism encompass other cases. There is thus no need to reach beyond the plain meaning of the statute to give effect to its express terms. And while plaintiffs cite Congressional debates about section 1083 as proof that they were the focus of Congress' attention, plaintiffs fail to account for the fact that neither the statute nor the legislative history ever mention the Accords or even the 1979 hostage taking.

To the extent section 1083 is ambiguous and can be interpreted as conflicting with the Accords, the Court must, in the absence of a "clear expression of Congressional intent to abrogate" the Accords, "interpret the statute so as to avoid the conflict." Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d at 169. The interpretation of section 1083 set forth by the United States not only is consistent with the Accords, but also with the statutory language and its

legislative history. Although it has once again been left "to this Court to play the role of the messenger of bad news," Roeder I, 195 F. Supp. 2d at 145, section 1083 can and must be interpreted as providing no cause of action for plaintiffs in this case.

ARGUMENT

I. SECTION 1083 CREATES NO CAUSE OF ACTION FOR PLAINTIFFS AGAINST IRAN FOR THE HOSTAGE TAKING

A. Section 1083 Refers to Roeder I in a Purely Jurisdictional Context That Has No Bearing on Whether the Statute Creates a Cause of Action for Plaintiffs

Plaintiffs contend that section 1083 unambiguously creates a cause of action for plaintiffs because 28 U.S.C. §1605A(a)(2)(B) specifically refers to their prior lawsuit, Roeder I. Plaintiffs' Memorandum of Points and Authorities in Opposition to the United States' Motion to Dismiss ("Pl. Opp.") at 1, 7. This argument is based on a fundamental misreading of the statute. Roeder I is referenced only in the portion of section1605A which provides for jurisdiction over claims against state sponsors of terrorism, i.e., section 1605A(a). This purely jurisdictional provision of the statute is separate and apart from the section that creates a cause of action, i.e., section 1605A(c), where Roeder I is not mentioned.

Section 1605A(a) provides for subject matter jurisdiction by creating specific exceptions to the immunity from liability in United States courts that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA"), generally grants to foreign states. See Roeder I, 195 F. Supp. 2d at 148-49. Paragraph (1) of section 1605A(a) states that a foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which money damages are sought against a foreign state for personal injury or death that was cause by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking . . . ." 28 U.S.C. § 1605A(a)(1)

(emphasis added). Paragraph (2) of section 1605A(a) then sets forth the specific exceptions to jurisdictional immunity, stating that a court shall hear a claim under the conditions described in subsections (2)(A) and (2)(B). 28 U.S.C. § 1605A(a)(2)(A) and (B). It is section1605A(a)(2)(B) which creates a specific exception to foreign sovereign immunity for Roeder I by providing that a claim shall be heard "if . . . the act [of terrorism] . . . is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia." 28 U.S.C. § 1605A(a)(2)(B). Thus, the reference to Roeder I in section 1083 occurs only in the jurisdictional provision of section 1605A, 28 U.S.C. § 1605A(a), and therefore the reference does not expressly or impliedly create a cause of action for the plaintiffs in Roeder I or here.[2]

Moreover, no reference to Roeder I is made in the section of the statute which creates a new cause of action against foreign governments, i.e., section 1605A(c), entitled "Private right of action." Section 1605A(c) does refer to jurisdictional subsection (A) of section 1605A(a)(2), for the purpose of defining the type of foreign state for which a cause of action is thereby created, but section 1605A(c) does not refer to the jurisdictional subsection where Roeder I is mentioned,

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[2] In roughly similar form, section 1605A(a) recodifies two prior jurisdictional laws, the Anti-Terrorism Act and Section 626(c), Pub. L. 107-77, 115 Stat. 748 (2001), both of which were amendments to the FSIA codified in 28 U.S.C. § 1605(a)(7). See § 1083(b)(1), (2) (striking 28 U.S.C. § 1605(a)(7) and inserting § 1605A); Republic of Iraq v. Beaty, __ S. Ct. __, 2009 WL 1576569, *4 (June 8, 2009).

Section 1605A(a)(2)(A)(i)(I) tracks the Anti-Terrorism Act, which "created a specific exception to the FSIA and thereby waived foreign sovereign immunity for certain state-sponsored terrorist acts." Roeder I, 195 F. Supp. 2d at 149. Section 1605A(a)(2)(B) tracks the former Section 626(c), which "amend[ed] the FSIA to provide jurisdiction over acts 'related to Case Number 1:00CV03110." Roeder I, 195 F. Supp. 2d at 165. Both of these former statutes conferred subject matter jurisdiction. See Roeder I, 195 F. Supp. 2d at 162 (stating that Section 626(c) is a "[j]urisdictional statute"); id. at 149 (noting that "the Antiterrorism Act waived the immunity of foreign states" but left questions as to what causes of action were available). They now confer jurisdiction as part of section 1605A(a).

section 1605A(a)(2)(B). Specifically, section 1605A(c) creates a cause of action with respect to a foreign state "that is or was a state sponsor of terrorism as described in subsection [1605A](a)(2)(A)(i)." (Emphasis added). But section 1605A(c) neither refers to nor incorporates section 1605A(a)(2)(B), which stands in complete isolation from the cause-of-action section and which can reasonably be interpreted only as being exclusively jurisdictional, viz., as providing jurisdiction for acts related to Roeder I. Thus, contrary to plaintiffs' claim, see Pl. Opp. at 7, there is no reason to assume that the jurisdictional reference to Roeder I in section 1605A(a)(2)(B) demonstrates an intent by Congress to also create a private right of action for the plaintiffs in Roeder I – or for those same plaintiffs in this case. And plaintiffs' assertion that Congress included a "direct reference to 'the claim under this section' for acts related to Roeder I when creating a new private right of action in § 1605A," Pl. Opp. at 16-17 (emphases added), is both misleading and wrong.

B. Section 1083 Was Not Enacted for Plaintiffs' Benefit and Is Instead a Statute of General Applicability

The argument that section 1083 was intended to benefit plaintiffs and otherwise is entirely "inexplicable" and "pointless" unless it creates a cause of action with respect to the 1979 Iranian hostage taking, Pl. Opp. at 6; see also id. at 9, 10, lacks merit. Section 1083 was enacted in January 2008, five years after the dismissal of plaintiffs' prior suit was upheld on appeal, see Roeder I, 333 F.3d 228 (D.C. Cir. 2003). There is simply no support for the notion that section 1083 was a direct response to the dismissal of plaintiffs' claims in Roeder I. Pl. Opp. at 5-6.

Furthermore, section 1083 is a statute of general applicability intended to permit U.S.

nationals to sue state sponsors of terrorism for damages in U.S. courts. See 154 Cong. Rec. S53, at 53 (daily ed. Jan. 22, 2008) (statement of Sen. Levin) (explaining that section 1083 "clarifies the law that permits U.S. nationals . . . who are victims of terrorist acts to sue state sponsors of terrorism for damages" and that "U.S. courts have previously entered such judgments against Iran, Libya, and Saddam Hussein's Iraq"). Section 1083 was directly relevant to various cases pending against Iran, Cuba, and Libya when it was passed. Indeed, the legislative history suggests that other cases, such as some against Libya, may have been of paramount importance in the passage of section 1083. See 154 Cong. Rec. S53, at 54 (daily ed. Jan. 22, 2008) (statement of Sen. Levin) (stating that the bill authorized the courts "to compensate victim [sic] of state-sponsored terrorism out of Libya's -- or other states' – assets").[3] Furthermore, section 1083(c)(4) established foreign sovereign liability for punitive damages for the first time in U.S. law, expanding the scope of possible judgments available in any number of cases against designated terrorist states. To say that section 1083 is inexplicable and pointless simply because it does not enable plaintiffs to sue Iran for the 1979 hostage taking is therefore untrue.

Plaintiffs also contend that section 1083 must be assumed to create a cause of action for

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[3] A number of cases against Libya were pending when section 1083 was enacted which may have been affected by it, such as Franqui v. Syrian Arab Republic, No. 1:06-CV-00734-RBW (D.D.C. filed April 21, 2006) (in which Libya was also a defendant), Patel v. Libyan Arab Jamahiriya, No. 1:06-CV-00626-PLF (D.D.C. filed April 5, 2006), and Buonocore v. Libyan Arab Jamahiriya, No. 1:06-CV-00727-GK, 2007 WL 2007509 (D.D.C. July 9, 2007). Congress also originally intended that various claims against Iraq be assisted by the legislation. See section 1083(d)(4) ("It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).").

them because it is the latest installment in an alleged ongoing dialogue among the branches of government. Pl. Opp. at 1; see also id. at 9 n.9, 18 n.15. Neither the language of the statute nor its legislative history indicate that Congress intended to allow redress against Iran for the 1979 hostage taking notwithstanding the Algiers Accords, particularly since it was passed five years after Roeder I. The timing of section 1083 in fact supports the opposite conclusion – i.e., that Congress did not intend to create a cause of action for plaintiffs.[4] This is because after years of litigation beginning in 1984, see Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984) (affirming dismissal on grounds that Iran was immune from suit under the FSIA), and after repeated admonitions by the courts that the Algiers Accords could be abrogated only through legislation that contains "a clear expression of intent to abrogate that agreement," Roeder I, 195 F. Supp. 2d at 175; see also Roeder I, 333 F.3d at 238 (citing Gregory v. Ashcroft, 501 U.S. 452, 461 (1991), Congress has still failed to clearly express an intent to abrogate the Accords. It could easily have done so by specifically creating a cause of action for the Roeder I plaintiffs, just as it specifically provided jurisdiction over Roeder I by name in 28 U.S.C. § 1605A(a)(2)(B). Congress also could have enacted legislation similar to that proposed by Senator Harkin,[5] which

[4] Indeed, timing did not automatically rescue Roeder I, which was dismissed even after Congress enacted Section 626(c) while Roeder I was pending and did so specifically to remove the jurisdictional obstacles to plaintiffs' claims in that case. Roeder I, 195 F. Supp. 2d at 145, 163, 180. The fact that section 1083 may be the latest in a series of statutory amendments does not warrant any automatic assumptions about its interpretation in this case.

[5] Senator Harkin's bill was but one in a series of unsuccessful efforts, made in the 107th, 108th, and 109th Congresses, to enact legislation that would have explicitly abrogated the provision of the Algiers Accords barring the hostages' suit. See generally Congressional Research Service Report for Congress, Order Code RL31258 (updated July 31, 2008), at CRS-31-32. That nothing in the latest legislation expressly abrogates the Accords is therefore not surprising. Id. at CRS-32.

stated that "[n]otwithstanding the Algiers Accords . . . a former Iranian hostage or immediate relative shall have a cause of action for money damages against the Government of Iran for the hostage taking . . . ." Roeder I, 195 F. Supp. 2d at 154. Although Congress shelved this bill (perhaps "by virtue of its clarity of purpose," Roeder I, 195 F. Supp. 2d at 184), the Court flagged it as containing "the type of language that might abrogate an executive agreement," Roeder I, 333 F.3d at 237. It can only be presumed that Congress has intentionally continued to shun Senator Harkin's language, despite this signal from the Court, because Congress simply does not intend to abrogate the Accords and put the United States in the position of violating long-standing international legal obligations. See Cannon v. Univ. of Chicago, 441 U.S. 677, 699 (1979) (indicating that in statutory construction, it must be presumed that Congress legislated with awareness of relevant judicial decisions); see also U.S. v. Alvarez-Hernandez, 478 F.3d 1060, 1067 (9th Cir. 2007) ("[W]e must presume that [a legislative body] acts with deliberation, rather than by inadvertence, when it drafts [enactments]."). Indeed, only two years after Roeder I, Congresswoman Ross-Lehtinen introduced a bill directly referencing the final decision in Roeder I and clearly expressing an intent to abrogate the Accords in order to secure payments to the former hostages.[6] This proposed bill was never referred out of committee.

C. Section 1083 Is Consistent With the Algiers Accords

Plaintiffs argue that because section 1083 is a later-in-time enactment, it abrogates the Algiers Accords even if Congress did not intend that result. Pl. Opp. at 10. In fact, however, as plaintiffs acknowledge, Pl. Opp. at 10, a later-in-time federal statute only supersedes

[6] See proposed bill "To provide for payment of certain claims against the government of Iran", H.R. 3358, 109th Cong. (2005).

"inconsistent" treaty provisions, Medellin v. Texas, 128 S. Ct. 1346, 1359 n.5 (2008). Here, section 1083 is consistent with the Algiers Accords. As the United States has shown, section 1083 creates a cause of action against state sponsors of terrorism only if the new action is "related" to a case that was pending in some form at the time section 1083 was enacted in January 2008. § 1803(c)(3). Because Roeder I was not pending at the time of enactment, section 1083 does not provide a cause of action for plaintiffs. Therefore, it does not conflict with the bar in the Algiers Accords of "the prosecution against Iran of any . . . claim of . . . a United States national arising out of [the 1979 hostage taking]." Roeder I, 333 F.3d at 232 (quoting Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principles, ¶ 11, 20 I.L.M. 223, 227 (1981)); see also Suspension of Litigation Against Iran, Exec. Order No. 12,294, ¶ 8, 46 Fed. Reg. 14,111 (Feb. 24, 1981); Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere, Exec. Order No. 12,283, 46 Fed. Reg. 7927 (Jan. 19, 1981).[7]

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[7] At the very least, section 1083 is ambiguous on this point, as evidenced by the fact, if by none other, that plaintiffs have taken 31 pages to argue the opposite conclusion. See Roeder I, 195 F. Supp. 2d at 174 ("While plaintiffs' argument that the legislative purpose and history should be considered when interpreting and harmonizing these provisions is appealing, it also directly undermines plaintiffs' contention that the statutory language is unambiguous."). As this Court has found, there can be no implicit repeal of a treaty where congressional action is ambiguous. Roeder I, 195 F. Supp. 2d at 169, citing Cook v. United States, 288 U.S. 102, 120 (1933); see also Morton v. Mancari, 417 U.S. 535, 551, 41 L. Ed. 2d 290 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); South African Airways v. Dole, 817 F.2d 119, 125 (D.C. Cir. 1987) ("congressional statutes must be construed wherever possible in a manner that will not require the United States 'to violate the law of nations'") (quoting The Schooner Charming Betsy, 6 U.S. (2 Cranch) at 118 , quoted in Weinberger v. Rossi, 456 U.S. 25, 32, 71 L. Ed. 2d 715 (1982)). Authority holding that unambiguous legislation supersedes earlier treaties and agreements, see Pl. Opp. at 10, therefore "does not stretch to this case," Roeder I, 195 F. Supp. 2d at 174.

D. As Interpreted By This Circuit, Section 1083(c)(3) Permits the Filing of a New Action Only If It Is Related to an Action That Was Pending at the Time of Enactment of Section 1083

Plaintiffs argue that even though section 1083(c) is entitled "Application to Pending Cases" (emphasis added), and subsumes both section 1083(c)(2) and (c)(3), only section 1083(c)(2) actually applies to pending cases, and section 1083(c)(3) does not. Pl. Opp. at 20. Plaintiffs again misconstrue the statute, because both subsections apply to pending cases. Section 1083(c)(2), entitled "Prior Actions," concerns actions that were previously brought under 28 U.S.C. § 1605(a)(7), but were "adversely affected" on grounds that section 1605(a)(7) "failed to create a cause of action against the state." Section 1083(c)(2)(i), (iii). Section 1083(c)(2) provides that the prior action "shall . . . be given effect as if the action had originally been filed under [28 U.S.C. § 1606A(c)]," if the prior action "is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure." § 1083(c)(2)(iv). Thus, section 1083(c)(2) provides for the refiling of still pending actions that were previously filed but that had failed for lack of a private right of action.[8]

Section 1083(c)(3) also concerns pending actions, but the category it covers involves pending "related" actions rather than pending "prior"actions. In particular, section 1083(c)(3) provides that "[i]f an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28," then "any other action arising out of the same act or incident may be brought under section 1605A of title 28," if the action is commenced within 60 days of the entry of judgment in the original action or the date of enactment of section 1083. § 1083(c)(3).

[8] This provision does not afford plaintiffs a right to sue because the prior action, Roeder I, is no longer "before the courts."

Under this section, then, a new action arising out of the same act as the original, pending action may be brought under section 1605A even if it would otherwise be untimely, as long as it is filed within the 60 day time restrictions. Contrary to plaintiffs' suggestion that the text of section 1083(c)(2) contains an explicit "pending-action limitation" whereas section 1083(c)(3) does not, Pl. Opp. at 20, 21, 22 n.21, there is no such limitation in the text of section 1083(c)(2), which does not use the word "pending" anywhere in its text at all. Rather, the pending limitation appears only in the heading of section 1083, which applies to subsections (c)(2) and (c)(3) alike.

Plaintiffs argue that if the "related actions" authorized by section 1083(c)(3) are limited to actions related only to pending cases, there would be no need for a separate section 1083(c)(3). Pl. Opp. at 22-23. This is not so. Sections 1083(c)(2) and (c)(3) permit the filing of two entirely different categories of cases. Section 1083(c)(2) permits the refiling, by virtue of its waiver of the defenses of res judicata, collateral estoppel, and statute of limitations, § 1083(c)(2)(B), of prior cases that are still pending in some form as of the date of enactment but that have been unsuccessful. On the other hand, section 1083(c)(3) permits the filing of new cases that are separate from, but related to, pending actions. Section 1083(c)(2) does not authorize the filing of new cases, so without section 1083(c)(3), the initiation of new actions arising out of the same incidents as still pending actions might be barred by the applicable statute of limitations. Section 1083(c)(3) is therefore not "mere unnecessary surplusage," Pl. Opp. at 22.

Moreover, it is not true, as plaintiffs allege, that if the actions permitted by section 1083(c)(3) were required to be related only to pending cases, then the timeliness of filing test would always run from entry of final judgment in the pending action, as required by section 1083(c)(3)(A), and that section 1083(c)(3)(B) would therefore be superfluous. Pl. Opp.

at 23. Section 1083(c)(3) provides that a new, related action brought under 28 U.S.C. § 1605A is timely filed:

> if the action is commenced not later than the latter of 60 days after –
> (A) the date of entry of judgment in the original action; or
> (B) the date of the enactment of this Act.

§ 1083(c)(3). Plaintiffs fail to account for the fact that judgment in the original, related case could have been entered more than 60 days before the enactment of section 1083 in January 2008, but the case could still be pending on appeal or pursuant to a motion for relief from a judgment or order under Fed. R. Civ. P. 60(b). Cf. § 1083(c)(2) (stating that prior actions could be "before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure"). In a situation where a case is still pending in some form after judgment, the "latter" date for purposes of timely filing of the new action under section 1083(c)(3) would be 60 days after the date of enactment of the Act, § 1083(c)(3)(B). Therefore, contrary to plaintiffs' claim, Pl. Opp. at 23, clause (B) providing this alternative date is not superfluous.

The conclusion that a new case filed under section 1083(c)(3) must be related to a "pending" case does not, as plaintiffs argue, derive exclusively from the "Application to Pending Cases" heading for section 1083(c). Pl. Opp. at 24-25. Rather, it is also based on the use of the present perfect tense in section 1083(c)(3), to the effect that the new action must be related to an action that "has been timely commenced," (emphasis added), and is therefore pending at the time of enactment of Section 1083.[9] The heading does not contradict the text of the statute, but to the

[9] Plaintiffs rely on Barrett v. United States, 423 U.S. 212 (1976), for the proposition that the use of the present perfect in the phrase "has been timely commenced" does not necessarily signify that the action is still pending. Pl. Opp. at 28. In Barrett, however, the court determined

extent this phrase is ambiguous, the heading clarifies it and resolves any doubt. See Bhd. of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 529 (1947) (stating that headings are of use "when they shed light on some ambiguous word or phrase" and are "tools available for the resolution of a doubt"); Gorman v. Nat'l Transp. Safety Bd., 558 F.3d 580, 589 (D.C. Cir. 2009) (same).

Furthermore, this meaning is reinforced by the decision in Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), rev'd on other grounds, Republic of Iraq v. Beaty, __ S. Ct. __, 2009 WL 1576569 (June 8, 2009), in which the Court construed section 1083, 28 U.S.C. § 1605A(a)(2)(A)(i)(II), as signifying that a new action could be considered "'filed . . . by reason of section 1083(c)(3)' if a pending 'related action' had been timely commenced." Simon, 529 F.3d at 1193 (emphasis added). The argument that the Court was not thereby suggesting that related actions must necessarily be pending, Pl. Opp. at 30, is belied by the Court's statement that, with respect to the filing of a new action "'by reason of section 1083(c)(3)' if a pending 'related action' had been timely commenced . . . Congress understood that the courts would retain jurisdiction over the original 'related action' described in § 1083(c)(3)." Simon, 529 F.3d at 1193 (emphasis added). By these words, the D.C. Circuit clearly interprets section 1083(c)(3) as depending on continued jurisdiction over the related action when the new action is filed, and therefore as requiring that the related action have been pending at the time of enactment of the NDAA.

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that the use of the statutory phrase "has been shipped" denoted an act that has been "completed." 423 U.S. at 216. A similar determination that a case "has been commenced" (such that "commencement" has therefore been "completed") would not, as with the completion of an act of shipping, denote that the action was therefore no longer pending.

This conclusion is further supported by the D.C. Circuit's statement that "[p]laintiffs with 'pending cases' may invoke new § 1605A in certain circumstances." Simon, 529 F.3d at 1192 (emphasis added). Plaintiffs wrongly accuse the United States of taking this statement out of context, Pl. Opp. at 29, and erroneously contend that the "pending" language only refers to section 1083(c)(2), Pl. Opp. at 29-30. In fact, the statement applies to both section 1083(c)(2) and (c)(3), which is clear from the title of the section in which the Court makes the statement: "Sections 1083(c)(2) and (c)(3)." The Court of Appeals explains that plaintiffs with pending cases may invoke new section 1605A (the "Terrorism exception to the jurisdictional immunity of a foreign state") in certain "circumstances," a plural term. Simon, 529 F.3d at 1192. The Court then proceeds to describe those circumstances. The first circumstance is when, "[p]ursuant to § 1083(c)(2) ('Prior Actions'), a plaintiff who detrimentally 'relied upon' former § 1605(a)(7) of the FSIA 'as creating a cause of action' and whose action was 'pending before the courts in any form' when the NDAA became law was given 60 days within which to 'refile' his suit based upon the new cause of action created by § 1605A(c)." Simon, 529 F.3d at 1192. The second circumstance arises under "[s]ection 1083(c)(3) of the NDAA ('Related Actions') [which] authorizes a plaintiff who had 'timely commenced' a 'related action' under § 1605(a)(7) to bring 'any other action arising out of the same act or incident,' provided 'the [new] action is commenced' within 60 days from the later of '(A) the date of the entry of judgment in the original action or (B) the date of the enactment of [the NDAA].'" Simon, 529 F.3d at 1192. Thus, contrary to plaintiffs' assertions, Pl. Opp. at 29-30, the United States did not take the quote out of context at all. The term "pending" applies to both section 1083(c)(2) and (c)(3), and there is no evidence anywhere in Simon that a plaintiff could invoke section 1083(c)(3) to file a new

case unless a related case was already pending.

II. SECTION 1083 DOES NOT EXPRESSLY ABROGATE THE ACCORDS

That the statutory language in section 1605(a)(2)(B) allegedly survived a presidential veto of a bill containing a version of the NDAA, Pl. Opp. at 17, is not evidence that Congress intended to abrogate the Algiers Accords and create a private right of action against Iran for the 1979 hostage taking. The bill was vetoed "because it would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction . . . ." Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641, 1641-42 (Dec. 28, 2007).[10] This proves nothing about Congress' intentions with respect to section 1083.

And while versions of the NDAA may have been debated and agreed to multiple times by both the House and Senate, see Pl. Opp. at 18 n.14, the fact that the political branches gave section 1083 this allegedly "intense attention," id. at 18, without once even mentioning the Algiers Accords or the 1979 Iranian hostage taking, is compelling evidence that Congress did not intend to repeal the Accords or afford the Roeder I plaintiffs a cause of action, and that the President did not interpret the NDAA to include an abrogation of the Accords. See Roeder I, 195 F. Supp. 2d at 182 ("An explicit expression of intent to abrogate a binding international agreement requires, at a minimum, an acknowledgment of the existence of that agreement."); see also id. at 175 ("'[L]egislative silence is not sufficient to abrogate a treaty,' Trans World Airlines

[10] The bill was revised to authorize the President "to waive the applicability of section 1083 to Iraq," 154 Cong. Rec. S53, at 53 (statement of Sen. Levin); Republic of Iraq v. Beaty, __ S. Ct. __, 2009 WL 1576569, at *4, thereby further demonstrating that section 1083 applied to various terrorist states and was not primarily for plaintiffs' benefit or intended to enable them to sue Iran for the 1979 hostage taking.

v. Franklin Mint Corp., 466 U.S. 243, 252 . . . (1984), or a bi-lateral executive international agreement.' See Weinberger v. Rossi, 456 U.S. 25, 32 . . . (1982)."); Roeder I, 333 F.2d at 238 (noting that the requirement of a clear statement by Congress "'assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision'") (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)). As support for the proposition that section 1083 creates a cause of action for plaintiffs here, plaintiffs quote Senator Levin's statement that changes to the language in an earlier bill were purportedly "acceptable to Senator Lautenberg." Pl. Opp. at 17-18. However, neither that nor any other statement in the legislative history indicates that Congress intended to provide a private right of action against Iran for the 1979 hostage taking or to repeal the Algiers Accords.

CONCLUSION

For the foregoing reasons, in addition to those stated in the United States' memorandum in support of its motion to dismiss, this action should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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